

NO. 83-1091

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**In the  
Supreme Court of the United States**

OCTOBER TERM, 1983

ANDRA A. CAPACI,

Petitioner,

VERSUS

KATZ & BESTHOFF, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI

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**PARTIES TO THE PROCEEDING**

In addition to the parties appearing in the caption to this Brief, the Equal Employment Opportunity Commission was a party to this action in the courts below.

Pursuant to Rule 28.1 of the Rules of this Court, undersigned counsel certify to the Court that, after diligent investigation, they are advised that Katz and Besthoff, Inc., has no parent companies, subsidiaries or affiliates as those terms are used in said rule.

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DANIEL LUND

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JAMES B. IRWIN

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MAY IT PLEASE THE COURT:

On December 30, 1983, Andra Capaci, plaintiff in the United States District Court for the Eastern District of Louisiana, and co-appellant in the Fifth Circuit Court of Appeals, petitioned this Court for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit, which judgment was rendered on August 8, 1983, the Court of Appeals having denied Petitions for Rehearing on October 3, 1983. Respondent, Katz & Besthoff, Inc. (hereinafter referred to as "K&B"), submits this Brief in Opposition to the Petition for a Writ of Certiorari filed by Andra Capaci.

## DECISIONS BELOW

Petitioner/plaintiff, Andra A. Capaci (hereinafter "Capaci"), a female registered pharmacist, filed a Complaint on October 8, 1974, against her former employer, K&B, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000-e *et seq.*, alleging that K&B discriminated against her on account of sex. More particularly, Capaci claimed that K&B discriminated against her by 1) refusing to promote her to a management position, 2) subjecting her to disparate conditions of employment, and 3) retaliating against her for filing a charge with the EEOC by harrasment, denial of a wage increase and discharge. The Equal Employment Opportunity Commission (EEOC) intervened on behalf of those alleged to be similarly situated. The scope of the evidence and issues tried or partially tried was far-reaching, and in some respects beyond the reasonable scope of the case. Numerous witnesses testified, and the exhibits took up five boxes. The District Judge allowed considerable latitude to the parties to develop their cases. An extensive record was made documenting Capaci's entire employment history, the history of K&B, and its policies and practices over that historical period. On March 26, 1979, the thirtieth trial day, the trial judge found petitioner's first attorney, Carl J. Schumacher, in contempt and suspended him from practicing in that court. (Appendix A, at A-1) The court then severed Capaci's claim, and the trial between K&B and the EEOC continued, concluding on April 2, 1979. Thereafter, Capaci secured the services of a new attorney, Dona S. Kahn, who was able to familiarize herself with the trial by reviewing the complete, thirty-four volume transcript. On April 14, 1980, one year later, the Capaci case resumed and was completed, together with rebuttal, that same day. On October 15, 1981, the District Court issued its opinion, which is reported at 525

F.Supp. 317 (Appendix to Capaci Petition, at A-15, Document B). It was the opinion of the District Court that Capaci had failed to prove her claims, except for the single claim that K&B had retaliated against her by the "intentional building of her personnel file" after she had filed a charge of discrimination with the EEOC. Final Judgment was entered on March 24, 1982 (Appendix to Capaci Petition, at A-87, Document C). Capaci appealed from the dismissal of her principal claims and on August 8, 1983, the United States Court of Appeals for the Fifth Circuit affirmed in all respects the District Court's decision as to Capaci in an Opinion reported at 711 F.2d 647 (Appendix to Capaci Petition, at A-90, Document D).

The instant Petition, filed on December 30, 1983 by Capaci's original attorney, raises three questions:

- 1) Whether the District Court, as affirmed by the Court of Appeals, committed error in refusing to permit the introduction of personnel files of 123 males who were allegedly guilty of conduct similar to that of Capaci;
- 2) Whether the District Court, as affirmed by the Court of Appeals, committed error in severing Capaci's case after her attorney was held in contempt, permitting the case to proceed to a conclusion between K&B and the Equal Employment Opportunity Commission to resume later with new counsel for Capaci; and
- 3) Whether Capaci is entitled to damages and attorney's fees because of the limited finding in her favor, that K&B discriminated against Capaci by building a personnel file against her after the charge was filed, even though her entire substantive case was dismissed.<sup>1</sup>

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<sup>1</sup> This latter question was not raised by petitioner in the Court of Appeals on appeal or in her Petition for Rehearing.



## STATEMENT OF THE CASE

K&B is a Louisiana corporation domiciled in the City of New Orleans, which operates a chain of drugstores in several states. The company was formed in 1905, and by the early 1920's, the organization had grown to four drugstores, all in the City of New Orleans. By 1970, there were a total of 34 stores, 26 of which were in New Orleans, and eight of which were located elsewhere. In 1971, a "new era" of rapid expansion began, and by February 1, 1979, there were 80 stores.

Capaci was first employed by K&B as a student pharmacist in 1959, while enrolled at Loyola University School of Pharmacy. Upon graduation in 1963, she was hired by K&B as a registered pharmacist. From the very beginning, her employment was rocky; she was frequently tardy, and she was reprimanded repeatedly. She engaged in unnecessarily long telephone conversations when it was her primary responsibility to take care of the prescription department and serve prescription customers. Her unprofessional habits prompted manager after manager to seek her transfer or discharge. On March 22, 1975, Capaci was terminated for insulting and intentionally humiliating a customer in the prescription department.

Most of the managers under whom she worked testified. Illustrative of their frustration in trying to deal with Capaci was the testimony of Manager Gereighty, who explained:

Well, there were so many things. She was late constantly. She could not pull a pharmacist's load, if that's what you want to call it, as well as other pharmacists that I have seen. She had

problems working with morning shift because she was, she couldn't work as fast, she could not do as many things as other pharmacist employees did. She caused a lot of discension [sic] among the clerks. She conducted a lot of her personal business at work. She was constantly distracted by telephone calls. She was generally a bad employee. (Appendix B, No. 1 at A-11).

The Fifth Circuit cited this manager's testimony as follows:

"One manager described her as 'probably the worst pharmacist that I have ever had working for me.' " (Appendix to Capaci Petition, at A-124.)

The Fifth Circuit quoted Ms. Annetta Robottom, a Chief Pharmacist who worked briefly with Capaci, in its Opinion, *Id.* at A-124, as follows:

"I have never worked with another pharmacist who was as disorganized ..... she, in comparing her with other pharmacists that I have worked with, had no awareness of trying to fill prescriptions or trying to get the work out."

The District Court observed that Capaci was not capable of being managed. She would be counseled by successive managers for the same offenses, but the counseling did no good. The testimony of Anthony J. Russo, Capaci's first manager, weighed heavily with the trial judge. He referred to Russo repeatedly in the Opinion. One pertinent observation follows:

He [Russo] reprimanded and counseled her repeatedly about her tardiness, which was

aggravated by her having to put on makeup before she commenced work, and about the excessive time she spent on the phone with personal calls, and by allowing business calls to last too long. She would heed his reprimands and counseling about her responsibility as a professional and would improve for awhile, but then go back to her same 'small faults.' " (*Id.* at A-69.)

Talking about yet another supervisor's dismay, Judge Cassibry incisively observed:

"She improved for a time and then the pattern continued—slide back into old habits, reprimand, improvement, slide back into old habits, etc." (*Id.* at A-70.)

With respect to manager Russo, the Trial Court stated:

Anthony Russo impressed the court with his sincerity in having tried to help Capaci overcome her deficits as an employee, and he gave up after five years with the realization that he had accomplished nothing. She never changed her poor work habits and no manager thereafter had patience with her shortcomings. (*Id.* at A-74-75.)

The District Court concluded:

"All of the managers were believable in their frustration at not being able to manager [sic] her."<sup>2</sup> (*Id.* at A-75.)

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<sup>2</sup> It is noteworthy that after Capaci left K&B and went to work for a small independent drugstore, she had the same problems. Lydia Whitaker, who testified by deposition, was the co-owner of Chateau Drugs. Capaci worked for Chateau from May 5, 1975 until June 23, 1975. Whitaker stated that Capaci was slow in the prescription

Capaci's employment with K&B was terminated on March 22, 1975 after an investigation into her handling of a prescription for a customer, Libby Lambremont. What became known during the trial as the "Lambremont incident" occurred on Friday evening, March 14, 1975. It proved to be the straw that broke the camel's back.

JoAnn Lambremont testified that she went to pick up a prescription for her sister, Libby. She was forced to wait 40-45 minutes while Capaci did "absolutely nothing," except engage in "primping her hair, looking around, maybe talking to somebody, but working, no." (App. B, No. 2, at A-13.) A backlog of prescription orders built up, and the waiting customers became frustrated. JoAnn Lambremont became frustrated. Capaci observed this and decided that she was going to teach Lambremont a lesson. She picked up the stack of waiting prescriptions and called out names until she got to Lambremont, whom she beckoned into the prescription department. Capaci did not ask any of the other people, whose names she called out first, to come to the prescription department—only Lambremont. When she reached the name Lambremont, eye contact was made, and Capaci beckoned *JoAnn* to the prescription department. Capaci brought Lambremont into the department and scolded her for allegedly antagonizing the customers. Having read the prescription, she knew Lambremont was there for Valium, and she insulted Lambremont by suggesting that Lambremont take a pill if she were so nervous and

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(Footnote 2 continued)

department, and that she, Whitaker, had received unfavorable reactions from various customers regarding Capaci's slow service. She complained about Capaci's use of the telephone. Whitaker terminated Capaci for these reasons, but gave her a favorable letter of recommendation with the understanding that Capaci would not claim unemployment compensation.

agitated. Capaci's treatment had the desired effect: Lambremont was humiliated and embarrassed. She came out of the prescription department red-faced and teary. In a business where service is the uppermost consideration, this abusive conduct toward waiting K&B customers required an appropriate response from the Company.

The Executive Vice President, Walter Feltman, testified that Capaci was terminated because she 1) took an inordinate amount of time filling prescriptions, disregarding customers, 2) invited a customer into the prescription department and 3) offered medication to a waiting customer who was not the person for whom the medication was intended. Feltman stated:

"It was embarrassing to her (Lambremont) to be called to the prescription department in the presence of other people who were there ahead of her, they were still waiting. She was offered medication. She was not there for the medication. She was there to accommodate her sister who was across the street at the bank. It was embarrassing and humiliating." (App. B, No. 3, at A-15.)

The District Court found that Capaci was "slow in getting prescriptions out" and that "she exercised bad judgment in handling Lambremont in a way to offend her." (App. to Capaci Petition, at A-84.) and concluded that her discharge was justified. The Court of Appeal affirmed:

"K&B has maintained that the Lambremont incident was the last straw. Under these facts, the Court's findings are *amply* supported." (Emphasis supplied) (*Id.* at A-124.)

K&B's experience with Capaci's employment from

the beginning, 1965, to the end, 1975, was painful, and the District Court recognized this:

"K&B's evidence has demonstrated that, despite Capaci's ability to fill prescriptions accurately, she was a poor employee .... An employer cannot be expected to consider such an unsatisfactory employee as qualified for promotion." (*Id.* at A-74)

The Court of Appeals concluded:

"The plaintiff was portrayed as a singularly inefficient and contentious employee." (*Id.* at A-123.)

### SUMMARY OF ARGUMENT

Petitioner suggests that the lower courts erred in not allowing her to introduce 123 personnel files of alleged similarly situated males as rebuttal evidence in order to establish pretext. The trial judge observed that the question of disparate treatment had been thoroughly litigated during the presentation of plaintiff's case in chief, and that plaintiff was provided an ample opportunity to introduce these files during that phase of the case. In affirming, the Fifth Circuit observed that the files which petitioner sought to introduce were in the courtroom throughout the presentation of petitioner's case in chief. Petitioner did introduce other personnel files and did litigate the question of disparate treatment throughout the presentation and cross-examination of live witnesses. The Fifth Circuit agreed that petitioner had been given ample opportunity to prove her case.

Next, petitioner suggests that the trial court erred

when it severed her case and continued with the case between the respondent and intervenor, EEOC, after petitioner's attorney had been held in contempt. Petitioner claimed she was denied her right to confront and cross-examine witnesses, but this argument is wholly without foundation since the trial judge stated at the time of the severance that any witness that was called by K&B which might affect petitioner's case would be recalled for cross-examination if petitioner thought it was necessary in order to defend herself in her case. The Court of Appeals found that the trial judge protected petitioner's rights and could find no abuse of discretion. The fact that petitioner decided not to exercise her unconditional right to recall these witnesses is not the error of the trial court.

Finally, petitioner suggests that she is entitled to an award for attorney's fees and damages arising out of the lower court's finding as affirmed by the Court of Appeals that the respondent retaliated against her by the building of a personnel file against her after the charge was filed. This issue was not raised at the district court level or in the Court of Appeals, and is therefore not properly before this Court on Petition for Writ of Certiorari. *Delta Airlines, Inc. v. August*, 450 U.S. 346, 101 S.Ct. 1146, 67 L.Ed.2d 287 (1981).

## ARGUMENT

- I. ***THE LOWER COURTS CORRECTLY RULED THAT 123 PERSONNEL FILES OF ALLEGED SIMILARLY SITUATED MALES SHOULD NOT BE RECEIVED AS REBUTTAL EVIDENCE IN THE CAPACI CASE.***

Trial was commenced on January 19, 1979. Capaci,

through her first attorney, Carl J. Schumacher, Jr., rested her case on March 5, 1979 as did the EEOC. On March 26, 1979, Mr. Schumacher was suspended from practicing law in Judge Cassibry's court, and the plaintiff's case was severed.<sup>3</sup> Thereafter, K&B proceeded and concluded its case against the EEOC on April 2, 1979. After conclusion of the EEOC case, plaintiff retained new counsel. An entire transcript of the trial proceedings was prepared so that Capaci's new lawyer could effectively participate in the conclusion of her case, and on April 14, 1980, more than a year later, K&B concluded its case against the plaintiff. The same day, the plaintiff presented her rebuttal case. During rebuttal, plaintiff sought to introduce 123 personnel files of male employees, alleged to be similarly situated to Capaci, for the overt purpose of establishing "pretext" by showing disparate treatment, in that males who were allegedly guilty of some of the same misconduct as Capaci, i.e. 1) excessive use of the telephone for personal reasons; 2) lateness; and 3) poor organization, were not discharged. The District Court refused to admit the files, stating that there had been "every opportunity" to introduce them in the case in chief, and their introduction in rebuttal would constitute a retrial of the case.

Petitioner suggests that the essential teaching of this Court in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), is that in a Title VII case the plaintiff must be afforded a "full and fair opportunity" to present evidence that the defendant's asserted reason(s) for its behavior are

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<sup>3</sup> The Transcript of Excerpt of Proceedings in Open Court, Monday, March 26, 1979, ordering the suspension of Mr. Schumacher and setting forth the reasons therefore is contained in the Appendix hereto as Appendix A, at A-1.



pretextual, and hence the Trial Judge should have permitted the introduction in rebuttal of the 123 personnel files. Respondent agrees this is the proper standard, but submits that the two Opinions below overwhelmingly demonstrate that petitioner was given a "full and fair opportunity."<sup>4</sup>

The District Judge refused to admit the files, observing that:

"Disparate treatment is not something new to this case now. Disparate treatment was treated throughout—[It] was put before the court throughout the case in chief." (App. B, No. 4, at A-17.)

In affirming the Trial Judge's decision, the Fifth Circuit observed:

"The trial judge felt that the new attorney, with a complete transcript of the thirty-four days of trial that had transpired a year earlier, was simply attempting to retry the case, as he made clear on the last day of the trial.

'I know, but you reviewed the record, and you're second guessing Mr. Schumacher.

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<sup>4</sup> Petitioner's approach to this issue differs from her presentation to the Fifth Circuit. There, Capaci asserted that this evidence was probative of pretext and was therefore properly offered in rebuttal under the three-step rationale expressed in *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The Court of Appeals dismissed this argument, saying that *McDonnell Douglas* did not require presentation of proof in a strictly ordered fashion corresponding to the three traditional stages of trial. The Fifth Circuit reasoned, "Most trials would be lopsided indeed if plaintiffs were confined to making the usually simple presentation of proof required to establish a prima facie case in their case in chief, leaving all other complex questions of pretext, disparate treatment, legitimate grounds for rejection of the plaintiff, prior history of discrimination, etc., to be litigated in later stages of the trial." (footnote omitted) (App. to Capaci Petition at A-120-121.)

You are saying now, well he didn't try the case right. He didn't try the case so that we could win it, so I'm going to try it over again. And that we cannot do.' " (App. to Capaci Petition, at A-121-122.)

Petitioner suggests that the 123 personnel files would reveal that certain males were guilty of conduct similar to that of Capaci. In Footnote 4 of the Petition, Capaci makes reference to some of those files as an example. Respondent objected to the introduction of the files because, among other reasons, their introduction would require more litigation in explanation of the files. For example, whereas Bruce Bordes' file shows prescription errors, it fails to show that on March 14, 1975, he was demoted from assistant manager to pharmacist. Similarly, Carol Culley's file does not reveal that he was demoted from assistant manager to relief manager in 1967, and from relief manager to pharmacist in 1969. Earl D'Aunoy was suspended for a week without pay on August 7, 1978, and Eugene Kaufman received a warning letter for his infractions, after which no further infractions were committed. The Fifth Circuit acknowledged this (*Id.* at A-122) and recognized the trial judge's dilemma:

Numerous concerns faced the trial judge. He was no doubt concerned that the plaintiff should not benefit from the sins of her previous attorney, to the unfair detriment of the defendant, by having a new attorney with an unusual opportunity to carefully and leisurely review the transcript and to offer a new approach to trying the case. He was faced with legitimate concerns of the defendant and other litigants on his docket to see this case end.

In affirming the Trial Judge, the Fifth Circuit stated:

...Based on the extensive discovery and pre-trial order, the plaintiff's attorney was fully aware of the defendant's proffered reasons for failing to promote and discharging her. The questions of disparate treatment and pretext were intertwined under the facts of this case, and were extensively litigated in the plaintiff's case in chief. Employee files and the testimony of many witnesses were introduced at that time. The Court made specific findings on issues of pretext in lack of promotion and discharge. 525 F.Supp. at 345, 350. All of the files the plaintiff's attorney wished to introduce were in the courtroom throughout the trial. The trial judge felt that the new attorney, with a complete transcript of the thirty-four days of trial that had transpired a year earlier, was simply attempting to retry the case [in chief], .... We agree that the plaintiff was given *ample* opportunity to prove her case. (Emphasis added) (*Id.* at A-121-122.)

Respondent relies upon this ruling to support its opposition to petitioner's point.

## II. *THE COURT DID NOT ERR IN SEVERING CAPACI'S CASE.*

On March 26, 1979, Judge Cassibry suspended Mr. Schumacher indefinitely from practicing before the District Court. (App. A at A-1) The personal complaint of Capaci was severed, and the EEOC's case allowed to proceed to a conclusion. As a result, Capaci maintains that her right to confront and cross-examine witnesses against her was frustrated, and that she was denied her fundamental right of due process.

When the plaintiff's case was severed, it was made crystal clear that Capaci would be given a "full opportunity for cross-examination" of any witnesses called by K&B in the remaining portion of its case. With Capaci present in the courtroom, the Judge stated, as quoted fully in the Fifth Circuit Opinion, as follows:

So there will be no misunderstanding, the case of Ms. Capaci is suspended as of now, as of this morning. I will disregard any evidence that has any direct effect upon her case unless it also affects the EEOC's case. As far as her case is concerned, though, I will disregard it until she has her lawyer and her trial is resumed and if necessary we will call back the same witnesses that we are calling now *which you think you may need to defend yourself in her case*. I am doing this, stating that so that she will have a chance to fully cross-examine any witness which might affect her case. (Emphasis supplied) (App. to Capaci Petition at A-125.)

On May 18, 1979, Dona S. Kahn was entered as Capaci's replacement counsel. The entire transcript was typed and Ms. Kahn acknowledged that she read it. Therefore, she was aware that she had the unconditional right to call for the production of any witness who testified after the case was severed. The fact that Ms. Kahn decided not to recall any witness is not the fault of K&B, should not be held against K&B, and cannot legitimately form the basis for a claim of error upon which Capaci can bootstrap this Petition.

Petitioner suggests that two witnesses were called after the severance whose testimony related in part to Capaci. They were June Buras and Saul Schneider. An

examination of the District Court and Fifth Circuit Opinions will reveal that their testimony was cumulative of the testimony of other witnesses who testified and who were cross-examined by Mr. Schumacher on behalf of Capaci. Nevertheless, during the rebuttal phase of the case, with new counsel, Capaci had the unconditional right to require the recall of these witnesses. Judge Cassibry made it clear that any witness would be recalled "which you think you may need to defend yourself in her case." (*Id.* at A-125). As a practical matter, Capaci's position was enhanced rather than disadvantaged by the severance. A review of the record, and the inescapable conclusion from the two lower court decisions, bears this out. Capaci spent a great deal of time pursuing her quixotic claims of sexual harrassment, and her case became bogged down in irrelevancies.<sup>5</sup> (See, in general, Transcript of excerpt of proceedings in Open Court, Monday, March 26, 1979, Appendix A.) As a result of the severance, a transcript was prepared and resumption of the trial delayed for over a year. The Court of Appeals recognized that this gave Capaci's new attorney "an unusual opportunity to *carefully* and *leisurely* review the transcript. ...." (Emphasis added) (App. to Capaci Petition at A-122). Ms. Kahn had almost a year to go to school on the testimony of Buras and Schneider and to load up on her cross-examination of them with a written transcript. The only reasonable explanation for not recalling the witnesses is that Capaci's new attorney made the tactical decision not to recall Buras and Schneider, so as to avoid reminding the trial judge of more live testimony adverse to Capaci. One thing is clear: petitioner's new attorney

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<sup>5</sup> Capaci alleged in her complaint that she was the victim of sexual harrassment. Capaci wasted a great deal of time in the trial court on this claim. The trial judge characterized the several allegations as "unsupported" and termed her evidence as "wholly inadequate." Capaci abandoned this aspect of her case, choosing not to raise it on appeal.

recognized she had the unconditional right to recall *any* witness, since she averred that she read the entire transcript, which would have necessarily included Judge Cassibry's admonition. (Excerpt of transcript attached as Appendix C at A-23 reflects Mrs. Kahn's statement that she read the trial transcript before the case was resumed.)

In order to hurdle this obstacle, petitioner now suggests that it was the Trial Judge's obligation to call these witnesses on behalf of Ms. Capaci to testify. Capaci states in her Petition that, "It [the Trial Court] did not recall Ms. Buras or Mr. Schneider." (Capaci Petition at 16) Respondent submits that petitioner misconstrues the role of the trial court when it suggests that it is the duty of the trial court to exercise the plaintiff's rights. The Fifth Circuit correctly observed that, "[t]he trial judge endeavored to protect Ms. Capaci's rights ...." (App. to Capaci Petition at A-125) Respondent submits that it may have been the Trial Judge's duty to "endeavor" to protect Ms. Capaci's rights, but it was certainly not its job to exercise those rights. The Fifth Circuit concluded that it could "find no abuse of discretion" (*Id.* at A-125), and this conclusion should not be disturbed.

### III. *AN ISSUE NOT RAISED BELOW IS NOT PROPERLY RAISED FOR THE FIRST TIME IN A PETITION FOR WRIT OF CERTIORARI.*

The District Court's sole finding in favor of petitioner, as affirmed by the Court of Appeals, was that she had been "harrassed" by the intentional building of her personnel file. The final judgment ordered that at the conclusion of the litigation, and after all time for seeking further appellate review expired, plaintiff's personnel file should be destroyed. Capaci suggests that the relief

granted by the Trial Judge is inadequate and unjust and that destruction of the personnel file is not enough, but that the Court be instructed to hold a hearing and make an award for damages caused by this technical finding of a violation and there be a determination of petitioner's legal fees. This issue was not raised by petitioner in her appeal to the Fifth Circuit, nor was it presented to the Fifth Circuit in Capaci's petition for a rehearing. Excerpts of Capaci's Appellate Brief entitled "Statement of the Issues" and her Petition for Rehearing entitled "Preliminary Statement" are included herein as Appendix D and Appendix E at A-24 and A-25, respectively. They reflect that this issue was not raised below.

This Court has observed and held on numerous occasions that arguments that were not raised in the District Court or in the Court of Appeals will not, absent exceptional circumstances, be reviewed by the Supreme Court. *United States v. Lovasco*, 431 U.S. 783, 788 n. 7, 97 S.Ct. 2044, 2048 n. 7, 52 L.Ed.2d 752 (1977); *Dothard v. Rawlinson*, 433 U.S. 321, 323 n. 1, 97 S.Ct. 2720, 2724 n. 1, 53 L.Ed.2d 786 (1977); *Tennessee v. Dunlap*, 426 U.S. 312, 316 n. 3, 96 S.Ct. 2099, 2102 n. 3, 48 L.Ed.2d 660 (1976); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2, 90 S.Ct. 1598, 1602 n. 2, 26 L.Ed.2d 142 (1970); 17 Wright, Miller & Cooper, Federal Practice and Procedure, §4036. Directly on point is *Delta Airlines, Inc. v. August*, *supra*, a gender-based Title VII case which dealt primarily with the effects of a Rule 68 offer of judgment. Petitioner, Delta Airlines, also protested the district court's denial of an award of costs in favor of Delta. This court refused to consider the question.

"Although defendant's petition for certiorari presented the question of the District Judge's

abuse of discretion in denying defendants costs under Rule 54(d), that question was not raised in the Court of Appeals and is not properly before us." 450 U.S. at 362, 101 S.Ct. at 1155.

### CONCLUSION

Capaci was hired part-time in 1963. She filed her charge in January of 1973. She states in her Petition that

"The first nine years of petitioner's employment were unexceptional." (Capaci Petition at 4.)

The direct implication is that she had no problems at K&B until she filed her first charge of discrimination in January, 1973.

*Nothing could be more untrue.*

In late 1968, because of the repeated complaints that manager Russo had voiced, James LeBlanc, who supervised various New Orleans area stores, took Capaci into Feltman's office, where he recommended her termination. Capaci promised to change her ways, and Feltman gave her another chance. In January of 1972, after she had been transferred to another store, LeBlanc sought her termination a second time for essentially the same reasons. This time Feltman agreed, but Sydney J. Besthoff, III, the President of K&B, did not, saying "work it out." Capaci was given another chance, and transferred to another store where the same problems re-occurred in May, 1972, and for the third time LeBlanc went to Feltman, seeking Capaci's termination. LeBlanc testified:

Well, this was the final straw again. I know that



I had said that before. It had to be her last chance. She had been in several stores now. This was the fourth store and she had been to the office twice and I really felt that this was the last straw, this was it. When I went to Mr. Feltman's office, Mr. Feltman was in obvious full agreement with me. When Ms. Capaci came in the office, we discussed everything at [Store] 20 again. He again got up, went to Mr. Besthoff's office and this time he came back he was very angry, more than a little upset with Mr. Besthoff because Mr. Besthoff again, wanted to give Ms. Capaci another opportunity to work it out. \*\*\* Mr. Feltman knew at that time that she could no longer work in any store that I supervised. (App. B, No. 5, at A-19)

LeBlanc tried three times to have Capaci terminated and failed each time. He expressed concern that his inability to effectively discipline or terminate errant employees under his supervision would subvert his credibility with store management. The only salvation for LeBlanc's credibility was to transfer Capaci to another store not under his overall supervision.

On May 11, 1972, Capaci was transferred to Store No. 10. The problems continued unabated. This time the personnel director, William Serda, agreed with Feltman that Capaci should be discharged. On August 3, 1972, once more Feltman recommended discharge but Besthoff deferred to Capaci again. Instead of termination, there would be another transfer. When she was sent from Store No. 26 to Store No. 24 on January 5, 1973, Feltman told her it was the last transfer; she would have to make it at Store No. 24. Six days later, Capaci filed her first charge. Reflecting on the Lambremont incident, the District Court observed:

Feltman, the store supervisors, LeBlanc and Levet, and Serda, the personnel director were in accord that she should be terminated before her charge was filed. The filing of her charge had no relevance to their evaluation of her as an employee. (App. to Capaci Petition at A-85.)

The Fifth Circuit agreed:

On the last occasion, vice president Feltman, personnel manager Serda, and supervisors LeBlanc and Levet all agreed that she should be terminated, but Sidney Besthoff, III, the president, decided to give her another chance, out of an interest in reducing turnover in the professional staff and a hope that the problems could be overcome. K&B has maintained that the Lambremont incident was the last straw. Under these facts, the court's findings are *amply* supported. (Emphasis supplied). (*Id.* at A-124.)

In the last analysis, Capaci's Petition suggests that

1) She was not given a fair opportunity to try her case,

a) Because 123 personnel files were excluded;  
and

b) Because she was not entitled to cross-examine witnesses who had been called after the severance, and

2) The facts found by the District Court as affirmed by the Appellate Court are not supported by the evidence in the record.

The suggestion that Capaci was not given a fair opportunity to try her case is ludicrous. The extraordinary

development of the trial, and especially the severance, gave her an unusual opportunity to try her case. After her first attorney was held in contempt, the case against the EEOC was concluded shortly thereafter. Then, a complete transcript of the thirty-four days of trial was prepared so that her new attorney, Donna Kahn, could review what went on before. It is an unusual circumstance when a new attorney can come into the final stages of a case, one year later, with the benefit of a transcript of the preceding thirty-four days of trial and with the benefit of a year's interlude to prepare for a final day of trial. It is all the more unusual that a trial judge would thereafter have the use of a typewritten transcript to resort to in reviewing the case and rendering his decision. Judge Cassibry had not only the benefit of seeing all the witnesses testify live, he also had the unique opportunity to receive briefs and to review briefs with reference to a typewritten transcript. He could recall the demeanor of the witnesses and re-check their testimony against a written transcript in making his decision and preparing his opinion. It is no surprise, therefore, that the Fifth Circuit observed that Judge Cassibry prepared a "careful and thorough discussion" of Capaci's allegations in his Opinion. As for the suggestion that Capaci did not have a fair opportunity to try her case, the Fifth Circuit quoted Judge Cassibry in its opinion as follows:

"...I was leaning over backwards during that trial to give this plaintiff every opportunity to get her case before me. If you read that record, you could see that I did." (*Id.* at A-122.)

The Fifth Circuit agreed:

"We agree that the plaintiff was given ample opportunity to prove her case." (*Id.* at A-122)

Capaci's petition to this Court is one which raises nothing more than disagreement with the factual findings of the Trial Court as affirmed by the Court of Appeals. It is important to note that the Fifth Circuit in affirming Judge Cassibry did not merely stand pat to say that his findings were not clearly erroneous. In two places in its opinion, the Court stated that his findings were "*amply*" supported. This Honorable Court should recognize this Petition for what it really is: an invitation to dabble in the facts. In a case that was tried to the limits, rendered by a district court with resort to a thirty-four volume transcript, and affirmed by the Court of Appeals, the Supreme Court should decline the invitation.

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DANIEL LUND

---

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1800 First National Bank of  
Commerce Building  
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Telephone: (504) 561-8989

Attorneys for Respondent,  
Katz & Besthoff, Inc.

OF COUNSEL:  
MONTGOMERY, BARNETT, BROWN & READ

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APPENDIX "A"

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

-0-

ANDRA A. CAPACI

CIVIL ACTION

VS

NO. 74-2743

KATZ & BESTHOFF, INC.

SECTION "E"

-0-

Transcript of excerpt of proceedings in Open  
Court, Monday, March 26, 1979. The Hon. FRED  
J. CASSIBRY, Judge, presiding.

-0-

APPEARANCES:

CARL J. SCHUMACHER, JR., ESQ.  
GREGORY GAMBEL, ESQ.

DANIEL LUND, ESQ.  
JAMES B. IRWIN, ESQ.

MS. CASSANDRA M. MENOKEN  
MS. ETHEL MIXON  
JAMES E. MILLER, ESQ.

-0-

-0-

MARCH 26, 1979

Effective immediately, I am suspending you, Carl

Schumacher, Jr., from the practice of law in my Court for an indefinite period of time. You have precipitated this action on my part because of the following acts committed in my presence.

Shortly after the beginning of the presentation of Miss Andra Capaci's case against K & B, you propounded questions to witnesses suggesting that one or more employees of K & B were homosexuals. More specifically, you asked a witness, "Is it not a fact that X is a homosexual?" I sustained objections to these questions, and you wished to make offers of proof. I sustained objections to your developing the offer of proof in Open Court because of the nature of the subject matter.

We retired to chambers on the record. I advised you that you would be permitted to develop your proof by affidavit, statement or deposition. I ruled as I did because we ascertained that there were no allegations in the pre-trial order that K & B discriminated against some women because certain of its managers were homosexuals.

I suggested that the defendant would have to be placed on notice so that it could defend against this sort of charge, and it was only fair that they have adequate time to prepare a defense against this sort of contention.

My final ruling was that if you had sufficient evidence to support such an assertion, then an amendment should be made to the pre-trial order and the trial should be delayed for an adequate period of time to permit the defendant to prepare a defense.

Before permitting an amendment, however, I attempted to determine what concrete evidence, if any, you

were prepared to present when the time came to try the issue. You simply re-alleged that you felt that certain supervisors and managers in K & B were homosexuals and that because of that fact women, and particularly Miss Capaci, were discriminated against. Even assuming you might be able to prove that there were homosexual supervisors and managers, it appeared to me that considerable expert testimony would be required to conclude that this would naturally result in discrimination against women.

You did not convince me that you had enough evidence to delay the trial further. I, therefore, sustained defendant's objection to any further testimony concerning alleged homosexuality of any of K & B's employees on the grounds of irrelevancy, and I instructed you not to mention the subject again.

A few days later in Open Court, and during the examination of a witness, you again, in direct violation of my specific order, opened the subject of the alleged homosexuality of K & B supervisors and managers. You were called into my chambers, and I advised you that you were in contempt of the Court. I deferred sentence.

During this same period, you called me at my home and attempted to, and did, discuss the case with me without the knowledge or approval of opposing counsel. On the record, you were instructed not to do that again.

Almost from the beginning of this trial, you were repeatedly tardy in arriving at trial—at the beginning in the morning and returning at noon. I was required to advise you during trial of your tardy habits, and I suggested that you correct them, and that if you could not be on time,

that you would at least have the courtesy to advise the Court.

Throughout the trial of this case, and in innumerable instances, which the record will reflect, you engaged in philosophic discussions and comment and argument despite my repeated suggestion that you ask relevant questions and that you move on with the trial. The record is replete with my suggestions to you that you were wasting the time of the Court and that you were dealing in irrelevancies.

Throughout the trial, you have been highly emotional, which is perfectly permissible so long as it does not interfere in the orderly conduct of the trial. Your emotional involvement in this case, both in and out of the courtroom, interrupted and interfered with the forward course of this trial. As an example, you have threatened to "beat the ass" of the leading counsel for the defendant in my chambers, in my presence.

You did on Friday last absent yourself from Court without proper notice, while investigating the alleged vandalizing of your automobile. I shall say more about this later.

On several occasions during this trial, you were guilty of badgering and attempting to intimidate witnesses by asking questions in an exceedingly loud voice, and at times glaring menacingly at them for long periods of time. Throughout the trial, you have shown the demeanor of a man who has some deep personal hate for the employees of the defendant company and for its lawyers.

You have repeatedly attempted to provoke the Court



by ending the cross-examination of K & B employees by reminding the Court that you would not be finished with the cross-examination if you were permitted to go into the "forbidden subject."

During the on-the-record discussions of the homosexual allegations you indicated to the Court that you felt that your and Miss Capaci's telephones were being tapped. Miss Capaci has also alleged that during the last few months she was employed at K & B the tires of her automobile were punctured on a number of occasions by persons unknown, the implication being that they were punctured at K & B's instigation.

On March 22, at around 9:30 a.m., you asked my court reporter to permit you to dictate a statement, not on the record, but to him, which you wanted him to present To Whom It May Concern in the event something happened to you. After you made your statement, my court reporter suggested that you should tell someone else the story you had related, and not just to him. My court reporter reported to me that you had dictated to him a statement, and that he had suggested that you tell someone else. My court reporter further suggested that the statement contained allegations which he thought I ought to know about. He did not divulge what those statements were, and I do not know what they are today.

At 10:00 a.m., I called all counsel into chambers, and on the record I asked you if you had anything that you wished to report. Your statement is on the record, and the gist of it was that Sidney Besthoff, III, a principal owner and president of K & B was, in combination with supervisors and managers of the company who were homosexuals, in a conspiracy with the local "Mafia" in the illicit

wholesale sale and distribution of controlled drugs. In reply to my question, you stated that you felt certain that you could prove these allegations beyond a reasonable doubt in a court of law.

You further stated that you had talked with an agent of the D.E.A. of the Justice Department for an hour, and that he had shown a great deal of interest in what you had to say about K & B and the alleged conspiracy, and that you were to contact him immediately after the conclusion of the trial.

You further stated that you had attempted to contact the district attorney of Jefferson Parish, Mr. John Mamoulides, and that you had been unable to locate him. You did say, however, that you were given a number to call and were told that if "Therese" were to answer that that person might tell you either where you might locate Mr. Mamoulides or whether Mr. Mamoulides would be willing to talk with you at all about these allegations.

You reported that you did call the number. A female by the name of Therese did answer, who stated to you that Mr. Mamoulides would discuss the matter but was reluctant to do so.

You reiterated that your telephones were tapped and that you felt that you were under surveillance by a person or persons unknown. You concluded that you feared for your life and the lives of your family. A copy of that statement by you on the record is attached.

We adjourned Court so that all parties could adjust to your latest charges and formulate solutions.

On the morning of March 23, at or around 8:00 a.m., I received a telephone call at my home from a man who identified himself as having gone to school with me at Tulane. His first words to me were, "I have someone here who would like to talk with you." The person said, "Hello, Fred, this is Carl." I immediately recognized your voice.

You stated to me, in effect, that when you looked at your automobile that morning the two front tires were flat, and had not been flat when you drove at 2:00 a.m. that morning. You speculated that they had been deliberately punctured. You stated to me that this act of vandalism was a warning to me that, "They aren't even afraid of the God-damned government."

You also stated that you had roped off the automobile so that no one would be able to get near it while you reported it to the appropriate authorities. You also asked me what you should do, and I suggested the local police, whom you indicated you didn't trust, and then I suggested the F.B.I. You apparently either contacted the F.B.I. or the U.S. Attorney's Office, because they advised me that you had been there and made allegations concerning the alleged activities of K & B.

You felt certain that this act of vandalism was aimed at you and the Court. And you implied that it was instigated by K & B. You told me that you may be a few minutes late getting to Court, and I told you that you would be expected to be there to begin trial at 10:00 o'clock or shortly thereafter.

Later that morning, at or around 10:00 a.m., your wife called me to say that you would be 30 minutes to an hour late, and I consented to that delay. When you had not

arrived or called by 11:30, I adjourned Court until 2:00 in the afternoon. Opposing counsel were present on time with witnesses prepared to proceed.


Because of the conduct and activities by yourself set forth above, which was in my presence and personally known to me, you have left me no alternative but to find you again in contempt of this Court. More specifically, in direct violation of my order, you called me on the telephone and related to me matters which could prejudice this Court. You have again violated my specific instructions that you report to Court on time unless you called and made adequate provisions for not being there.

Over and beyond the specific grounds for holding you in contempt, I find you have made serious criminal charges against officials of K & B which could prejudice the Court. You did this after my specific instructions that you not engage in irrelevancies.

All this, plus your rude, discourteous and non-professional attitude toward your opponent and its counsel, had made it impossible for me to continue to conduct a fair trial for anyone, including your client with you present in the courtroom.

You are therefore suspended from the practice of law in my Court for an indefinite period. After the expiration of 60 days, you may apply for re-admission, and I shall give it due consideration.

I further order that the personal complaint of Andra Capaci vs. K & B be severed and the trial of that cause will continue at a later date to be assigned by the Court. The trial of the intervention of EEOC vs. K & B shall continue



as scheduled.

\*

\*

\*

CERTIFICATE

I certify the foregoing pages numbered 1 thru 7 contain a true and correct transcript of an excerpt of the proceedings held in Open Court March 26, 1979, to the best of my ability.

---

Joseph H. Echezabal  
Official Reporter

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APPENDIX "B", NO. 1

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

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ANDRA CAPACI

CIVIL ACTION

versus

NO. 74-2743

KATZ & BESTHOFF, INC.

SECTION "E"

---

Proceedings in Open Court on Monday, March 9,  
1979; THE HON. FRED J. CASSIBRY, District  
Judge, presiding.

APPEARANCES:

For Plaintiff:

CARL J. SCHUMACHER, JR., Esq.

For Defendant:

DANIEL LUND, Esq.  
JAMES B. IRWIN, Esq.

For Intervenor:

MS. CASSANDRA M. MENOKEN  
MS. ETHEL MIXON  
JAMES E. MILLER, Esq.

Witnesses:

EUGENE LAVERGNE (2)  
THOMAS GERRIGHTY (61)  
SGT. HENRY SPAKO (122)

THOMAS GERRIGHTY (143)  
ROBERT RUGAN (183)  
CYRUS MILLER (210)

Reported by:

JOSEPH H. ECHEZABAL  
OFFICIAL COURT REPORTER

Q I realize that you are describing and characterizing it, but I would ask you to give me the specifics of what you are talking about.

A Well, there were so many things. She was late constantly. She could not pull a pharmacist's load, if that's what you want to call it, as well as other pharmacists that I have seen. She had problems working the morning shift because she was, she couldn't work as fast, she could not do as many things as other pharmacist employees did. She caused a lot of discension among the clerks. She conducted a lot of her personal business at work. She was constantly distracted by telephone calls. She was generally a bad employee.

APPENDIX "B", NO. 2

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

---

ANDRA CAPACI

CIVIL ACTION

versus

NO. 74-2743

KATZ & BESTHOFF, INC.

---

SECTION "E"

Proceedings held in Open Court on March 20,  
1979, the Honorable Fred J. Cassibry, District  
Judge, presiding.

APPEARANCES:

For Plaintiff:

CARL J. SCHUMACHER, JR., ESQ.

For Defendant:

DANIEL LUND, ESQ.

JAMES B. IRWIN, ESQ.

For Intervenor:

MS. CASSANDRA M. MENOKEN

MS. ETHEL MIXON

Reported by:

JOSEPH A. ECHEZABAL,

Official Court Reporter



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Q. Did you ever have occasion, during the forty or forty-five minutes to observe what, if anything, the pharmacist, Ms. Capaci, was doing?

A. No, sir, she was doing absolutely nothing. She was primping her hair, looking around, maybe talking to somebody but working, no. She was looking in a mirror. She wasn't doing anything with the prescriptions.

APPENDIX "B", NO. 3

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

---

ANDRA CAPACI

CIVIL ACTION

versus

NO. 74-2743

KATZ & BESTHOFF, INC.

SECTION "E"

---

Proceedings in Open Court on February 12, 1979, the  
Honorable Fred J. Cassibry, District Judge, presiding.

APPEARANCES:

For Plaintiff:

CARL J. SCHUMACHER, JR., ESQ.

For Defendant:

DANIEL LUND, ESQ.

JAMES B. IRWIN, ESQ.

For Intervenor:

MS. CASSANDRA M. MENOKEN

MS. ETHEL MIXON

Reported by:

JOSEPH A. ECHEZABAL,  
Official Court Reporter

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Q. What was the outrageous wrong that was done when Capaci offered one Valium to a woman named Lambremont?

A. It was embarrassing to her to be called to the prescription department in the presence of other people who were there ahead of her, they were still waiting. She was offered medication. She was not there for the medication. She was there to accommodate her sister who was across the street in the bank. It was embarrassing and humiliating.

APPENDIX "B", NO. 4

APPEARANCES:

DONA S. KAHN

Attorney-at-Law

15th Floor

Three Girard Plaza

Philadelphia, Pennsylvania 19102

Attorney for the Plaintiff

MONTGOMERY, BARNETT, BROWN & READ

Attorneys-at-Law

BY: DANIEL LUND, ESQ.

JAMES B. IRWIN, ESQ.

806 First N.B.C. Building

New Orleans, Louisiana 70112

Attorneys for the Defendant

Reported by:

Linda Ponsaa, CSR

WITNESS DIRECT CROSS RE-DIRECT RE-CROSS

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John Troussel	124			
Andra Capaci	133	189	193	

MS. KAHN:

They had there—

THE COURT:

And then we wouldn't have to go and try all these cases. What I would be doing is just giving you another chance to prove your case. This isn't rebuttal. This isn't rebuttal at all. This is just new matter in the case in chief.

MS. KAHN:

I can't help but wonder how we can account for all the Supreme Court decisions that specifically articulate that after the defendant has put on its reasons for its behavior, the plaintiff then not be given—Fifth Circuit said this in quote, "Not be given an opportunity to show that there was disparate treatment."

The defendant knew of this few in this case. If he had researched any other cases he—

THE COURT:

Disparate treatment is not something new to this case now. Disparate treatment was treated throughout—was put before the Court throughout the case in chief.

MS. KAHN:

Well, the essence—they should have—

THE COURT:

What you are doing, you are just expanding on disparate treatment. You're reading more proof.

APPENDIX "B", NO. 5

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

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ANDRA CAPACI

CIVIL ACTION

versus

NO. 74-2743

KATZ & BESTHOFF, INC.

SECTION "E"

---

Proceedings in Open Court on March 13, 1979, the  
Honorable Fred J. Cassibry, District Judge, presiding.

APPEARANCES:

For Plaintiff:

CARL J. SCHUMACHER, JR., ESQ.

For Defendant:

DANIEL LUND, ESQ.  
JAMES B. IRWIN, ESQ.

For Intervenor:

MS. CASSANDRA M. MENOKEN  
MS. ETHEL MIXON

Reported by:

Joseph A. Echezabal  
Official Court Reporter

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Q. Why did you make an appointment to see Mr. Feltman?

A. Well, this was the final straw, again. I know that I had said that before. It had to be her last chance. She had been in several stores now. This was the fourth store and she had been to the office twice and I really felt that this was the last straw, this was it. When I went to Mr. Feltman's office, Mr. Feltman was in obvious full agreement with me. When Ms. Capaci came in the office we discussed everything at 20 again. He again got up, went to Mr. Besthoff's office and this time he came back he was very angry, more than a little upset, with Mr. Besthoff because Mr. Besthoff, again, wanted to give Ms. Capaci another opportunity to work it out.

Q. What happened after that—before you say that, what did Ms. Capaci say, if anything, at the meeting in Mr. Feltman's office upon the occasion of the transfer from 20?

A. Well, other than the routine thing, complaining about tardiness, which was also a big problem at Number 20, but the telephone calls and the inability to keep up with the more important work, Ms. Capaci felt that she was being left to do all of the work by herself, that she didn't get enough help in the prescription department from Mr. Rugan, who was the assistant manager, who had other

duties to perform. He was not full time in the prescription department.

Q. You say that Mr. Feltman got up apparently to go to see Mr. Besthoff and he came back and he appeared to be mad. Describe in more detail what happened.

A. Well, when he came back, again he was red faced, muttering and very angry. Mr. Feltman can get very angry and he came back and he announced we would send Ms. Capaci to another store and this surprised me. Mr. Feltman knew at that time that she could no longer work at any store that I supervised.

Q. How did he know that?

A. He knew how I felt and he knew strike one, two and three, you are out. I felt Ms. Capaci would be taken out of my area supervision in the foreseeable future and she was.

Q. Did she ever, again, work in any store where you were the supervisor?

A. No, sir.

Q. After transferring from 20, that was the end of her working in stores under your supervision?

A. That is correct.

Q. Why did you feel that way? What made you feel that she could never work in another one of your stores?

A. Of course, the ultimate decision would not be



mine. I didn't want her working in any of my stores. I had nothing but trouble with her. I could not control Ms. Capaci at all. She would not pay any attention to me. It certainly would not be in my best interest to have her in any store that I supervised.

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF LOUISIANA

---

ANDRA CAPACI,

CIVIL ACTION

Plaintiff

and

NO. 74-2743

EQUAL EMPLOYMENT OPPORTUNITY  
COMMISSION,

SECTION "E"

Plaintiff-Intervenor

versus

MAG. DIV. 4

KATZ & BESTHOFF, INC.,

Defendant.

---

Motion for involuntary dismissal heard on Wednesday, March 19, 1980; THE HON. FRED E. CASSIBRY, District Judge, presiding.

APPEARANCES

For Plaintiff:

Ms. DONA S. KAHN  
Harris & Kahn  
1521 Three Girard Plaza  
Philadelphia, Pennsylvania 19102.

For Plaintiff-Intervenor:

JAMES E. MILLER, Esq.  
Equal Employment Opportunity Commission  
Washington, D.C. 20506.

For Defendant:

DANIEL L. LUND, Esq.  
JAMES B. IRWIN, Esq.  
Montgomery, Barnett, Brown & Read  
806 First National Bank of Commerce  
New Orleans, Louisiana 70112.

THE COURT: Wasn't that fully developed by Mr. Schumacher in Ms. Capaci's case in chief?

MS. KAHN: Your Honor, I've read every transcript that was given to me, and I see not one file, not one bit of evidence, except with respect to possibly one person, that goes to what has happened. I have reviewed the—

THE COURT: Well, I know, but what you're trying to do, you're trying to get in by rebuttal something that was not presented in the principal demand, and I don't know how you can do that.

Where do the rules provide for that?

APPENDIX "D"

STATEMENT OF THE ISSUES

- I. Did the Court err by failing to receive in evidence the personnel files of similarly situated male pharmacists on rebuttal to establish that males who engaged in the comparable activity attributed to plaintiff by defendant or more serious infractions and conduct were not similarly discharged by defendant and in fact at times were promoted.
- II. Did the Court err in finding on the basis of the evidence at the trial that the plaintiff had failed to establish pretext.
- III. Did the Court err in allowing the trial to proceed with evidence damaging and prejudicial to plaintiff without her being represented by counsel.

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**APPENDIX "E"**

**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

---

No. 82-3228

---

**ANDRA A. CAPACI,  
Plaintiff-Appellant  
Cross-Appellee**

**vs.**

**KATZ & BESTHOFF, INC.,  
Defendant-Appellee  
Cross-Appellant**

**EQUAL EMPLOYMENT OPPORTUNITY  
COMMISSION,  
Intervenor-Appellant**

---

**ON APPEAL FROM THE  
UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF LOUISIANA**

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**PLAINTIFF-APPELLANT'S  
PETITION FOR REHEARING**

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**PRELIMINARY STATEMENT**

Plaintiff-Appellant, Andra Capaci, respectfully presents this Petition for Rehearing pursuant to Rule 40, Federal Rules of Appellate Procedure, to direct the Court's

attention to certain points of law and fact that the Court may have overlooked or misapprehended in its original opinion. As will be more particularly detailed in the following argument, these matters include the following:

- 1) Omissions and misstatements of various facts and arguments relating to the reason for Plaintiff-Appellant's termination, i.e., the "Lambremon" incident.

- 2) Omissions and misstatements of various facts and arguments relating to the reasons for not promoting Plaintiff-Appellant.

- 3) Misapprehensions of the "clearly erroneous" findings by the Trial Court on the pretext issue.